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In the Supreme Court
OF THE
United States

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CHARLES ELMORE CROPLEY
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OCTOBER TERM, 1942

No. 913

MIDSTATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Midstate Horticultural Co., Inc., respectfully shows that:

This petition is concerned with the construction placed upon Section 16 (3)(a) of the Interstate Commerce Act by the Supreme Court of the State of California, which petitioner contends is in direct contra-

diction of the interpretation placed upon that section by this Court and by every Federal Appellate Court which has been called upon to consider the section.

Section 16 (3)(a) of the Act reads:

> "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." (49 U. S. C. A., Sec. 16 (3)(a).)

SUMMARY OF THE POINT INVOLVED.

This application presents for consideration a single clean-cut legal proposition.

In October and November of 1932 respondent carrier transported on petitioner's order twenty-one carloads of grapes from California, each of which was originally consigned, or, while in transit, diverted to Jerome Distributing Company at a stated destination located either in New York or New Jersey.

None of the transportation charges for such grapes was prepaid by petitioner. Although respondent carrier was legally obligated to collect such transportation charges from the Jerome Distributing Company upon delivery to it of the shipments; instead of so doing, in purported payment of such and other charges (R. 104, fol. 160), it accepted from Jerome Distributing Company, three checks, viz., one dated November 21, 1932 for $10,433.46 (R. 100-1, fols. 153-155), another dated November 22, 1932 for $7035.19 (R. 101-102, fols. 155-157) and another dated Novem-

ber 19, 1932 for $9237.11. (R. 103-104, fols. 158-159.) Photolithographs of these checks will be found on pages 159 and 164 of the record.

At or about the time these checks were accepted, *respondent receipted in full the freight bills covering the shipments above mentioned* and delivered them to the consignee, Jerome Distributing Company (R. 111-114, fols. 170-174), which in turn sent them to the consignor, petitioner herein, obviously for the purpose of convincing petitioner that the transportation charges had been paid. (R. 153-155, fols. 231-235.)

The bank upon which the Jerome Distributing Company's checks were drawn refused payment on the ground of insufficiency of funds on deposit to cover them. (R. 100, fol. 154; R. 102, fol. 156; R. 104, fol. 159.)

Subsequently respondent carrier instituted an action in the New York Courts against the Jerome Distributing Company to enforce payment of the three checks above mentioned, and on July 9, 1936, secured judgment against that company in the sum of $21,294.00. (R. 121, fol. 184-185.)

All attempts by respondent to enforce payment of the judgment were without avail, because of the insolvency of the Jerome Distributing Company.

No notice was given petitioner that the freight charges had not been paid, that respondent had taken checks in payment or purported payment thereof, or that the checks had been refused payment, until June 23, 1933. (R. 143-145, fols. 217-220.)

Within a few days before the expiration of the three-year period within which an action could be brought to recover such transportation charges, respondent for the first time demanded payment thereof from petitioner. (R. 122, fol. 187.) In fact, during the interim, damage claims were paid by respondent to petitioner without any attempt on the part of respondent to offset them because of the unpaid transportation charges here involved. (R. 147-148, fols. 223, 224.)

To permit it to investigate the basis of said demand, petitioner, on October 25, 1935, signed a waiver of the statute of limitations, in consideration of which respondent agreed to defer its threatened action until January 1, 1936. This waiver, after reciting petitioner's desire for additional time to investigate the claim, contained the following:

> "Now, therefore, in consideration of the forbearance of The Pennsylvania Railroad Company to bring such a suit against the Mid-State Horticultural Company, Inc. prior to October 28, 1935, the said Mid-State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action it, the said Mid-State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.
>
> "This agreement is not an admission of the alleged debt by the Mid-State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid-State Horticultural Company, Inc. may have to said claim.

"Dated at Philadelphia, Pa., this 25th day of October, 1935." (Ex. C, attached to First Amended Complaint, R. 39-41, fols. 53d, 53e.)

As a result of its investigation, petitioner, concluded that it was not responsible for the claimed transportation charges and so advised respondent, whereupon the action herein involved was instituted.

In its defense petitioner contended that the waiver of the statute of limitations signed by it, and the coincident agreement by respondent to defer its contemplated action until January 1, 1936, violated the purposes intended to be accomplished by Congress in enacting the Interstate Commerce Act, as such purposes had been repeatedly declared by this and other federal Courts, and that they were therefore void. As a special defense, petitioner pleaded that because of respondent's conduct and silence, of which comment is made above, respondent was *estopped* from enforcing payment of such transportation charges against petitioner; it being asserted by petitioner that if it had been advised by respondent that its transportation charges had not been paid, or if respondent had not receipted the freight bills covering said charges, in settling its accounts with Jerome Distributing Company no credit would have been given to it by petitioner for such transportation charges, and petitioner would not now be confronted with the double payment of these charges in the event the judgment of the Court below is enforced.

The final pleadings in this case were: respondent's first amended complaint (R. 1-41) and petitioner's

demurrer thereto (R. 41-49, fols. 54-65); petitioner's amended answer (R. 51-77, fols. 72-110) and respondent's demurrer to petitioner's amended answer. (R. 77-81, fols. 112-117.)

The first amended complaint was divided into twenty-one causes of action (one for each carload of grapes). Petitioner, by demurrer to its amended answer, raised the point as to each count of plaintiff's amended complaint that it did not

> "state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of par. 3, sec. 16, of the Interstate Commerce Act." (R. 41-42, fol. 55; R. 42, fols. 55-56, etc.)

The trial Court struck from petitioner's pleading, and from the case, the special defense that respondent was estopped from looking to petitioner for payment of the freight charges because:

> (1) It accepted the checks of Jerome Distributing Company in payment of the charges, indorsed "paid" on the freight bills, and delivered such bills so receipted to such company.
>
> (2) Jerome Distributing Company delivered its "receipted" bills to petitioner and thus secured a credit by offset against moneys owing to petitioner from that company, save and except the nominal sum of $790.00, and then became insolvent.
>
> (3) By prosecuting its claim against Jerome Distributing Company to judgment it had sig-

nified its election to look to that company for the debt. (R. 74, fol. 106; R. 75, fol. 108; R. 78-79, fol. 114; R. 82, fol. 120.)

And following the trial, in reliance upon the purported "waiver" the Court found that the action was not barred by the provisions of Section 16 (3)(a), of the Act, despite the running of the three-year period, and gave judgment against petitioner for $21,822.86 and costs.

THE POINT WAS PRESENTED TO CALIFORNIA SUPREME COURT.

Petitioner appealed from the judgment and the appeal was first heard and determined by the District Court of Appeal of the State of California, for the Fourth Appellate District. That Court described the issue before it as follows:

> "The sole question involved in this appeal is this: Can the limitation provided in sub-paragraph 'a' of paragraph 3, of Sec. 16, of the Interstate Commerce Act be waived by the shipper by a written agreement executed upon sufficient consideration before the statute has run?" (R. 171, 172, fols. 256, 257.)

The two members of that Court, who joined in the majority opinion were misled into the belief that (to quote the Court):

> "The only question necessary for consideration is whether plaintiff's right of action to recover its bill for freight was created by the Interstate

Commerce Act or whether it existed independent of the act." (R. 173, fol. 260.)

From that premise they reasoned that the right of a railroad to sue for its charges existed at common law, and affirmed the judgment with the conclusion that since the right had existed at common law, Section (3)(a) of the Interstate Commerce Act was a mere statute of limitations which could be waived.

The third member of that Court wrote a strong dissenting opinion, analyzing the decisions in point and holding that:

"We conclude, therefore, that under the provisions of Section 16 (3)(a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forbear is contrary to the plain policy of the act and is therefore against public policy and void." (R. 191, fol. 284.)

Petitioner herein, thereafter sought and was granted a hearing of the cause by the Supreme Court of the State of California, the highest Court of the state. Petitioner in its petition for a hearing by that Court gave the following as the grounds:

"1. That the action is governed by the provisions of the Interstate Commerce Act, and par-

ticularly section 16 thereof, as construed and interpreted by the United States Supreme Court, the appellate courts of appeal, and the highest courts of the various states.

"2. That upon the expiration of three years from the delivery of the shipments involved, the right to collect the transportation charges was destroyed by the operation of section 16 (3)(a) of the Act, which expressly provides that it shall apply to 'all carriers subject to this chapter', and therefore the court lacked jurisdiction to enforce payment thereof.

"3. That the intent and purpose sought to be accomplished by Congress in passing the Act (implicit in the Act itself), prohibits the waiver of the limitation period prescribed by section 16 of the Act.

"4. Whether the pending action is one to enforce a right based upon the Interstate Commerce Act or rising out of contract is immaterial; defendant being a carrier subject to the Act, in either case upon the expiration of the limitation period, the right of action ceases and jurisdiction is lost.

"5. That regardless of all other considerations, it must be held that the Act created a right of action theretofore non-existent in federal jurisdiction, which Act prescribed the period within which such action had to be commenced, thereby bringing the existing controversy within the exception to the limitation rule recognized by the appellate court in its majority opinion.

"6. That if the appellate court correctly held that the right of action was not based upon the Act, but was at common law, its further holding that under the Act the defense of estoppel was not legally permissible, was unwarranted and constituted a miscarriage of justice by subjecting appellant to double liability.

"7. That a rehearing is essential to the end that uniformity of decision upon the important questions involved may be maintained (W. R. Phillips Co. v. Grand Trunk R. Co., 236 U. S. 662, 59 L. Ed. 774), and that appellant may not be subject to double liability by failure of the trial court to follow well-established legal principles." (R. 194-195, fols. 300-301.)

The Supreme Court of California heard the cause and affirmed the judgment on the same grounds as had been adopted in the majority opinion of the lower Appellate Court. (For the opinion see pages 196 to 204 of the Record.) It conceded that if, under Section 16 of the Act, the lapse of time "operates to terminate the obligation as well as bar the remedy", no waiver of the time element could be of any effect. (R. 199, fol. 307.) But it held that the cause of action is destroyed by the lapse of the period of limitations provided by the statute, only in those cases where the cause of action has been *created* by the statute, as distinguished from one existing at common law. On this point the Court said:

"This general rule (that the statute may be waived) governs unless the action is created by

statute and the language of definition requires a construction that the cause of action is destroyed by the lapse of the period of limitations provided by the statute." (R. 199, fol. 307.)

THE CALIFORNIA COURT'S DECISION IS DIRECTLY CONTRARY TO THIS COURT'S INTERPRETATION OF THE ACT.

The above conclusion of the California Supreme Court is directly contrary to this Court's decision in *A. J. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, in which another subdivision of Section 16 of the Act (which, in common with Section 16. (3)(a), with which we are concerned, carried the words *"and after")* was being interpreted, and in which this Court said as to the claim that the statute of limitations might be waived:

> " 'But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, and *not after*. Under such a statute the lapse of time not only bars the remedy, but destroys the liability * * * To permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to

> the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here * * * For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action.'" (236 U. S. 662, 35 S. Ct. 446, 59 L. Ed. 774.)

The decision of the California Court is likewise in contradiction of this Court's decisions in *Kansas City So. Ry. Co. v. Wolf*, 261 U. S. 133, and in *U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 88 Fed. (2d) 459, and other decisions noted in our accompanying brief.

The California Supreme Court in this case, in order to reach its decision against petitioner, ignored the plain dictates of the above language of this Court and adopted the contrary precedent of an *Ohio District Court* expressed in a less than one page opinion, containing no citation of precedent, rendered on the routine sustaining of a demurrer, in the case of *Pennsylvania Rr. v. Susquehanna Collieries*, 23 Fed. (2d) 499. (R. 197-198, fol. 306.) That decision was predicated on the theory that the interpretation of this Court in the *Phillips* case did not apply where the cause sued upon was of a kind recognized by the common law; and it ignored the plain intention of the words *"and not after"*, which term this Court in the *Phillips* case (supra) interpreted as meaning just what it says.

THIS PETITION IS IN TIME.

The Supreme Court's decision in the present case was rendered on November 27, 1942. (R. 196, fol. 304.) It denied petitioner a rehearing, thus giving finality to the judgment, on December 24, 1942. (R. 205, fol. 312.)

On March 16, 1943 this Court extended the time in which this petition should be filed to and including April 22, 1943. (R. 207.)

THIS COURT'S JURISDICTION TO HEAR PETITION.

This Court's jurisdiction to hear and grant this petition is found in Section 237, Judicial Code (28 U. S. C. A. 344 (b)), the pertinent portion of which reads as follows:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

CONCLUSION.

Petitioner believes that this petition should be granted under the reason of *Rule 38* (5) (a) of this Court, which reads:

> "(a) Where a state court has decided a Federal question of substance, * * * in a way probably not in accord with applicable decisions of this Court."

Dated, San Francisco, California,
April 5, 1943.

Respectfully submitted,
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BRIEF IN SUPPORT OF PETITION.

The Supreme Court of California adopted a remarkable procedure in this case—in that it gave to a trial Court decision, rendered in a routine overruling of a demurrer, precedence over the decisions of this, the highest Court of the land, as well as of decisions of Federal Courts of Appeal.

The state Court decision after conceding that "the answer to the question is controlled by the Federal statutes and the Federal Courts' construction thereof as applied to similar facts", made its choice between:

(1) Following this Court's decisions in *Phillips v. Grand Trunk Western R. Co.*, 236 U. S. 662; *United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, and *Kansas City So. Ry. v. Wolf*, 261 U. S. 133; the decision of the Circuit Court of Appeals of the Seventh Circuit in *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 Fed. (2d) 459, and the decision of the Circuit Court of Appeals of the Sixth Circuit in *Louisville & N. R. Co. v. Cory*, 54 Fed. (2d) 8, on the one hand,

and

(2) Following at respondent's insistence the lonely decision of an Ohio District Court in *Pennsylvania R. Co. v. Susquehanna Collieries Co.*, 23 Fed. (2d) 499, on the other.

Surprising enough it is that the Court chose to follow the District Court decision, on the stated ground that it was the only case where the facts were

identical with those in the case at bar, and also chose to ignore the fact that the identical *principle* involved in the present case was involved and interpreted in the above cited decisions of this Court and of two Circuit Courts of Appeals.

But more surprising still is the fact that the precedent which that state Court adopted was a one-half page opinion rendered by a trial Court on the overruling of a demurrer, which contains no citation of authority; and, although decided in 1927, over 17 years ago, has never been cited—the state Court states it has been "neither disapproved or criticised". In other words it possessed neither "pride of ancestry, nor hope of posterity".

The holding in the Susquehanna case.

The *Susquehanna* case (supra) involved the same statute as is here involved, namely, Section 16 (3) of the Interstate Commerce Act. It was an action to recover demurrage charges, brought more than three years after the accrual of the action. The plaintiff alleged a written agreement of defendant waiving the statute. The defendant demurred, raising the bar of Section 16 (3).

The Court overruled the demurrer, giving as a ground that the cause of action was one growing out of contract rather than one conferred by the Interstate Commerce Act, and therefore the statute of limitations might be waived.

This Court's decisions on this point.

This Court in *Phillips v. Grand Trunk R. Co.*, 236 U. S. 662, very definitely disposed of the distinction upon which the Ohio District Court based its opinion, if any such distinction had ever existed. That was an action filed in the Circuit Court of the United States for the Eastern District of Michigan, by a shipper against a carrier for an overcharge of freight rates, and was predicated upon the fact that an increase in rates, which had been filed and upon which the charges were based, had been held unreasonable by the Interstate Commerce Commission. The action was instituted more than 2 years after the cause accrued. The limitation statute then read:

> "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrued, and not after." (34 St. at Large, 590, Chapter 3591.)

The defendant carrier demurred on the ground of the statute. The plaintiff unsuccessfully sought to avoid dismissal by arguing that the point was not raisable by demurrer since under Michigan law the defense of statute of limitations could not be the subject of a demurrer.

This Court held that upon the expiration of the two-year period, the cause of action was utterly destroyed; and in so deciding answered every argument respondent herein could make in support of the decision of the California Supreme Court in this case. For that reason we take the liberty of setting forth the following long quotation from that opinion:

"It is argued, however, that under the conformity act (Rev. Stat. Sec. 914, Comp. Stat. 1913, Sec. 1537), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. *But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years,* **and not after.** Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232, 31 L. ed. 128, 130, 8 Sup. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, *either by silence or by express waiver,* to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against

> others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, *but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier.* The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute, it was evident, as matter of law, that the plaintiff had no cause of action. The carrier not being liable to the plaintiff for overcharges collected more than four years prior to the bringing of this suit, it was proper to dismiss the action." (Emphasis by italics ours, by blackface, the Court's.)

From the foregoing quotation it will be observed that this Court's reasons for declaring that the lapse of the statutory time "destroys the liability" are primarily that:

> (1) The statute "indicates its purpose to prevent suits on delayed claims; by the provision that all claims for damages should be filed within two years *and not after.*" (Thus placing its emphasis on the words "*and not after.*")
>
> (2) The requirements of uniformity, "which must be borne in mind in construing the commerce act, demand that all defendants in actions between carrier and shipper be treated alike and prohibit "*either by silence or by express waiver*" the extending of the time within which to file

suit beyond that fixed by the act as the limit of action, and furthermore this Court went so far in its determination as to apply the statute which was particularly directed to actions filed before the Commission, to actions filed before the Courts.

In the present case as we have already shown the pertinent statute applies to "all actions at law by carriers for recovery of their charges", and declares that such actions *must* be begun "within three years from the time the cause of action accrues *and not after*". (Sec. 16 (3)(a) of the Act; 49 U. S. C. A., Sec. 16 (3)(a).)

In *Kansas City Southern Ry. Co. v. Wolf,* 261 U. S. 133, the plaintiff shipper without filing a claim with the Interstate Commerce Commissioner, sued the railroad to recover charges collected over and above the published tariff rates. The statute gave the shipper the alternative of filing a claim with the Interstate Commerce Commission or suing direct in the Courts. The limitation statute Section 16(3)(b) of the act read and still reads that "all complaints for damages shall be filed with the Commissioner within two years from the time the cause of action accrues, and not after".

The defendant demurred to the complaint on the ground that the cause of action was barred by the above referred to language of the act, while plaintiff contended that the two year statute was directed solely to complaints filed before the Commission. This Court held that the two year limitation applied irrespective of whether the action was before the Commission or in the Courts, and quoted in support of its holding, the

language from the decision in *Phillips Co. v. Grand Trunk* (supra), which we have quoted on pages 18-19 herein. In conclusion, this Court said:

> "The lapse of time has destroyed any liability by the carrier to the shipper." (140)

The same conclusion was reached by this Court in *U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission,* 246 U. S. 638, at 642, in which in applying Section 16 of the Act to a proceeding before the Commission, the Commission had held it had completely lost jurisdiction when the two years expired. This Court concurred in the following language:

> "We agree with this conclusion of the Commission, that the two-year provision of the act *is not a mere statute of limitation, but is jurisdictional,* * * * is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion. (Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 538, 544, 54 L. Ed. 608, 609, 30 Sup. Ct. Rep. 417.) That such was the opinion of this court was clearly intimated in *Phillips Co. v. Grand Trunk Western R. Co.,* 236 U. S. 662, 667, 59 L. Ed. 774, 776, 33 Sup. Ct. Rep. 444, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the court of claims. (Ford v. United States, 116 U. S. 213, 29 L. Ed. 608, 6 Sup. Ct. Rep. 360; Finn v. United States, 123 U. S. 227, 232, 31 L. Ed. 128, 130, 8 Sup. Ct. Rep. 82; United States v. Wardwell, 172 U. S. 48, 52, 43 L. Ed. 360, 361, 19 Sup. Ct. Rep. 86.)" (Italics ours.)

It was held to the same effect in *Danzer & Co. v. Gulf & Ship Island, R. R. Co.*, 268 U. S. 633.

Circuit Courts of Appeals decisions following "Phillips" case decision.

In *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 Fed. (2d) 459, 461, the Circuit Court of Appeals of the 7th Circuit, reversed a District Court decision to the effect that the defendant was *estopped* from setting up the limitation of Section 16 (3) of the act, by requesting the submission of the controversy to the commission before bringing action. The court of appeals said with reference to that section of the act:

> "The Supreme Court has in numerous cases construed these limitations as jurisdictional, and held that the lapse of time not only bars the remedy but also destroys the liability."

and cited the four decisions of this Court which we have cited earlier in this brief, and quoted from that portion of the decision in *U. S. ex rel. Louisville Cement Co. v. I. C. C.*, 246 U. S. 638, which declares that Section 16 *"is not a mere statute of limitation, but is jurisdictional"* and that "the defense of statute of limitation *was not subject to estoppel*". (Emphasis ours.)

The opinion closed with the statement that *"events occurring subsequent to the delivery"* (of the goods to the carrier) "may not be relied upon to extend the period within which this suit must be brought". (462) (Emphasis ours.)

In *Louisville & N. R. Co. v. Cory,* 54 Fed. (2d) 8, the Court of Appeals of the Sixth Circuit, in reversing a District Court, answered the argument used by respondent in this case that Section 16 (3) of the Act does not apply to actions existing at common law, by holding that since Congress has made Interstate Commerce the subject matter of direct legislation, that section applies to all actions where the shipper has the right to petition the Interstate Commerce Commission "and this whether the shipper elects to pursue that form of remedy or one given him by the common law". (Citing *Phillips v. Grand Trunk etc.* (supra).) (11)

In face of the foregoing decisions of this Court and of the Courts of appeal, the decision of the California Supreme Court must stand or fall on the contrary precedent created by a trial judge in the *Susquehanna* case.

Forced to concede that "the answer to the question is controlled by the federal statutes and the federal court's construction thereof" (R. 197, fol. 305), the California Supreme Court selected as its precedents: (1) that portion of the trial Court's decision in the *Susquehanna* case which (without any cited precedent, federal or state) held that the right of action to recover charges grew out of contract and therefore could be kept alive by contract beyond the statutory period, and (2) the rule expressed in three California cases and two encyclopedia texts that "generally a statute of limitations may be extended or waived". (R. 199, fol. 307.)

We have already shown how the interpretation of the Interstate Commerce Act, contained in the Susquehanna decision, is overridden by this Court's decisions and those of different Circuit Courts of Appeal—and that the section of the act involved, by use of the words of emphasis "and not after" destroys the cause of action at the end of three years, despite any general rule as to the rights of waiver or estoppel.

The distinction claimed by respondent to exist between statutory actions and actions upon contract is here entirely inapplicable for the obvious reasons that the only thing contractual or within the power of agreement of the parties is the question of whether the shipper will ship. The conditions of shipment and the tariff to be paid are fixed by the Interstate Commerce Act and the regulations thereunder. The relationship, as well as the liability, arises out of and is based upon the Commerce Act.

The Circuit Court of Appeals of the Fourth Circuit declared in

Pennsylvania R. Co. v. Carolina Portland Cement Co., 16 F. (2d) 760, at 762,

that an action for demurrage charges, which is closely akin to an action for transportation charges,

> "is one which arises out of the statutes of the United States and the action of the Interstate Commerce Commission taken thereunder."

To the same effect, see:

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 at 671 (Commerce Court);

Button v. A. T. & S. F. R. Co., 1 F. (2d) 709 at 711, 8th C. C. A.;

Chicago & N. W. R. Co. v. J. I. Case Plow Wks., 180 N. W. (Wis.) 846 at 847;

Chicago I. & L. Ry. Co. v. Peterson, 169 N. W. (Wis.) 558 at 559;

Vicksburg etc. R. Co. v. Paup, 47 F. (2d) 1069, 5th C. C. A.;

Blodgett Co. v. N. Y. C. R. Co., 159 N. E. (Mass.) 45 at 47.

The higher Courts of other states have found no difficulty in determining the proper federal interpretation of the act in its relation to the time of commencing actions, without recourse to trial Court opinions.

In *Spartan Mills v. Davis, Director General*, 119 S. E. 905 at 907, the claim was made that the limitation as specified in the bill of lading had been waived by the carrier. The South Carolina Court of last resort after holding that the waiver was legally deficient, said:

> "Even if there had been a positive agreement on the part of the defendant to extend the time within which such suit should be commenced it would not avail the plaintiff. * * * If the carrier may by agreement or by conduct fix what is a 'reasonable time for delivery' in any case it would seem that it might or might not invoke the defense of this contractual limitation at its option, and could in that particular practice at pleasure discrimination in the payment or contest of claims."

It then quotes from

Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. Ed. 1096, as follows:

> "It was decided that the parties to an interstate bill of lading cannot waive its terms; that the carrier cannot by its conduct give the shipper a right to ignore them; and that 'a different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed'."

The Carolina Court then declared that:

> "This declaration is equally applicable to the contract limitation relating to commencing suit."

In the late case of *L. M. Kirkpatrick Co. v. I. C. R. Co.,* 195 So. 692, 694, it was claimed that the action was barred because not brought within two years and a day from the time appellee rejected in writing appellant's claim for damages as required by the bill of lading. In affirming a judgment in favor of the defendant the Mississippi Supreme Court, among other things, said:

> "The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end, the carrier is without power to waive any valid provision of the contract constituting a defense. Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., 200 S. W. 109."

And after quoting from earlier cases, the decision proceeds:

"The carrier cannot by conversations, letters and negotiations extend the time for suit beyond that limited by the bill of lading and the Commerce Act. Shroyer v. Chicago R. I. & G. Ry. Co., 111 Tex. 24, 222 S. W. 1095. 'An interstate carrier cannot extend the time within which under the bill of lading a suit against it for loss of the goods may be brought, as that would involve a discrimination.'"

The decision then cites a number of state and *federal* cases, and with respect thereto states that they:

"although not directly in point lay down principles which inevitably lead to the conclusion that when the statute of limitations is put in operation, it cannot be estopped by agreement between the carrier and the shipper. * * *

"These decisions mean that under the provisions of the Commerce Act, and the uniform bill of lading provided by the Interstate Commerce Commission, the time fixed within which claim for loss shall be filed, as well as the time fixed within which suit must be brought, are conditions precedent to liability. In other words, after the lapse of such time, both the right and the remedy are barred. And, they mean further that neither period of time can be waived by the carrier. Otherwise, the door would be open to discriminations in favor of one class of shippers over another. The Commerce Act sought as far as possible to bring about not only uniformity and equality in rates but uniformity and equality in all services and practices of common carriers in interstate commerce. In considering this question, it should be borne in mind that this is not exclu-

sively private litigation—the result affecting alone the parties to the cause. In a large measure, it is public litigation—the result affecting the public generally, as well as the parties to the particular cause. The question as to what rights can be waived by a party to a transaction affected with a public interest, is very different where the rights of the parties alone are involved."

SECTION 16 OF THE COMMERCE ACT IS ALL EMBRACING AND APPLIES TO ALL ACTIONS AT LAW REGARDLESS OF THEIR ORIGIN OR CHARACTER.

Regardless of any other consideration, Section 16 of the Commerce Act is determinative of this controversy.

The majority opinion of the District Court of Appeal was based solely upon the ground that the action is a common law action, and not one created by or based upon the Interstate Commerce Act, and therefore Section 16 thereof, as to such character of action, should not be construed in accord with the decisions cited by petitioner.

The decision of the Supreme Court of California partakes largely of the same infirmity.

Such holdings, if adhered to, would necessarily require that said Section 16, with respect to one type of action at law should receive one construction, and as to all other actions at law another. In support of this strange and heretofore unknown rule of construction no authorities are or can be cited. To any such

principle petitioner is unable to subscribe. No such intention can logically or legally be imputed to Congress when enacting such section.

If Section 16 is applicable at all to this case (which respondent concedes) its effect, as heretofore judicially determined, is equally applicable.

It is, as it must be, conceded that Congress was constitutionally authorized to enact the Interstate Commerce Act, and that if deemed appropriate, it was legally empowered to therein provide that *any action at law,* whether brought by or against a carrier engaged in interstate commerce respecting interstate shipments, must be commenced within a specified period, **and not after,** with the intention that unless so instituted within the prescribed limitation period the cause of action would be destroyed and the Court deprived of jurisdiction to enforce the asserted claim.

With this concession in mind the **sole** legal question here involved can readily be determined by recourse alone to the provisions of Section 16 (including 3(a) of the Commerce Act). The language of this section is *all-inclusive;* it makes no distinction between actions based upon or created by the act and other actions, just so long as the action is an *action at law.* It relates to and completely envelops *every action at law* including those instituted by a carrier for the recovery of **all** freight charges or any part thereof. The only attribute that the action must possess to subordinate it to the terms of Section 16 is that it is an *action at law.* Section 16 3(a) reads:

> "*All actions at law* by carrier under the subject of this chapter for the recovery of freight charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, *and not after.*"

That this is an action at law is unquestioned. That it is an action for the recovery of freight charges is conceded. That the section in question applies to such an action, whether it is instituted to recover all freight charges or only a part thereof is obvious from the language of the section. The language in which Section 16 is couched is clear and definite. It possesses no latent ambiguity. Its purpose is made known to all who can read. Its understanding and interpretation are entirely outside of the realm of speculation or conjecture. "All actions at law by a carrier subject to this chapter" means exactly what it states and includes *all actions at law*, whether in the form of common law actions or *actions at law* instituted for the purpose of enforcing any of the rights mentioned in each subdivision of such Section 16. To hold otherwise would be to render innocuous and of no avail an express congressional mandate.

To arbitrarily divide actions at law into classifications and to construe Section 16 as to one of these classifications in one fashion and in another manner as to other classifications is a procedure heretofore unknown to legal jurisprudence.

That it was the intention of Congress to destroy the cause of action upon the expiration of the limitation

period is held in every case (except the so-called *Susquehanna* case) in which its construction was involved.

ALLEGED WAIVER OF LIMITATION STATUTE VOID BECAUSE PROHIBITED BY INTERSTATE COMMERCE ACT AS A DISCRIMINATION.

In concluding, contrary to the decisions of this Court, that the waiver of the statute of limitations was valid, the Supreme Court of California said:

> "However, as we have noted, a contract to preserve the carrier's right and duty to collect lawful freight charges as against the running of the statute of limitations when reasonably exercised, serves to prevent, rather than create, discrimination among shippers, and in our opinion, should not be deemed violative of the language or purpose of the Interstate Commerce Act."

This is in clear disregard of the decisions of this and other Federal Courts above cited. Preliminarily, it may be stated that it is not the *result* to either of the parties of the prohibited act which determines whether the Commerce Act has or has not been violated, but the possibilities which may follow in the event the act engaged in is given legal recognition. An extension of the statutory period within which suit is required to be instituted necessarily involves joint action by both carrier and shipper. The consideration for a waiver signed by the shipper is the agreement on the part of the carrier to forbear the institution of an action for some appreciable period of time beyond

the statute of limitations. In the absence of an extension or an agreement to extend by the carrier, the waiver would be legally ineffective. *And if the carrier is legally empowered to extend for even a day the period fixed in the statute, it possesses equal authority to extend it for a much longer period, or for years should it so desire.*

The question then arises: Could such waiver, signed by the shipper, and such extension granted, or agreed to be granted, by the carrier, operate as a discrimination or preference denounced by the Commerce Act? The answer to this question, which must be in the affirmative, conclusively brings such waiver and extension agreement within the prohibition of the act as well as of the decisions declaring void as against public policy any such waiver.

It is obvious that if, in consideration of the execution by the shipper of such waiver, the carrier is legally possessed of authority to extend the statutory time for the commencement of action by it against a shipper, it necessarily possesses the power *in its uncontrolled discretion* to discriminate between different shippers and thereby to prolong and possibly sustain the life of one shipper to whom the extension is granted, and at the same time to destroy the commercial existence of another shipper to whom such extension is denied. It could likewise choose between two shippers, each of identical financial stability, each requesting such an extension of credit based upon identical considerations, each willing to accept the same extension of time and each willing to execute a

waiver, and could grant the requested extension to one and deny it to the other.

If such conduct can be legally countenanced as between a carrier and two shippers, the possibility of comparable action on the part of the same or other carriers in their dealings with shippers generally can readily be comprehended.

To illustrate: If shippers knew that in the event they were subjected to financial pressure, by executing a waiver of the statute they could obtain from certain carriers an extension of credit or of the time in which incurred transportation charges would have to be paid, which extensions other carriers were unwilling to grant, discriminations of the most flagrant character would undoubtedly occur. And if such practices were indulged in, it is obvious that certain carriers would be enabled thereby to obtain business that normally would go to other cariers. Furthermore, in the event such practices were permitted, carriers themselves could discriminate between shippers—depending upon the volume of business controlled by certain shippers as against others—or upon the relative financial responsibility of the various shippers.

Thus to permit waiver of the statutory period of limitation by a shipper would make possible the preferences and discriminations denounced by the Interstate Commerce Act, and serve to defeat the purpose of that Act, just as surely as to permit waivers by the carrier would, as we have shown by the authorities heretofore cited, result in such preferences and discriminatoins. To confer authority upon the shipper to make such a

waiver would be as destructive of the scheme and purpose of the Act as to confer it upon the carrier. The result in the former case would be the same as that which the Court had in mind in

American Ry. Express Co. v. Shideler, 165 N. E. (Ind.) 336, at 337,

in stating that:

> "Under the law appellant and appellee were bound by the terms and provisions of the contract covering the transportation of this interstate shipment, and appellant did not and *legally could not waive the limitation of time* within which this action must by the terms of such contract be begun. * * *" (Citing cases.)

Under no circumstances may the statute be varied, enlarged, altered or waived by the carrier, since to do so would be in effect to give the person against whom it is waived, enlarged, etc. a greater and different right than other parties who deal with railroad carriers. Such a result is manifestly in contravention of the expressed purpose and effect of the Interstate Commerce Act.

In this connection we believe it also proper to call attention to the language of Mr. Chief Justice Taft in the case of

United States v. Koenig Coal Co., 270 U. S. 512,

as follows:

> "We have often declared that the purpose of Congress in the Elkins Law was to cut up by the roots every form of discrimination, favoritism and inequality."

CONCLUSION.

In closing we respectfully submit that the decision of the California Supreme Court does violence to this Court's interpretation of the Interstate Commerce Act, and a hearing of the cause by this Court is necessary to remove that precedent to the end that neither it nor the District Court decision of the *Susquehanna* case can hereafter lead other Courts away from the principles upon which the Interstate Commerce Act is based.

Dated, San Francisco, California,
April 5, 1943.

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